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Monitoring of commitments concerning social rights

Report
Social, Health and Family Affairs Committee
Rapporteur: Mr Claude EVIN, France, Socialist Group

Summary

The Assembly underlines that the revised European Social Charter should be regarded as the basic core of social rights which Council of Europe member states should guarantee for their citizens.

In this connection, the Assembly urges the states parties to take steps to ensure that the revised European Social Charter becomes the reference standard for European social policy and calls on the Committee of Ministers to take the necessary measures for the members of the European Committee of Social Rights to be elected by the Parliamentary Assembly as from the next partial renewal of the committee.

The Assembly also proposes organising regular debates on social policy and wishes to hold debates on the activities of the International Labour Organisation.

A. Draft recommendation

1. The revised European Social Charter (ETS No. 163) – which replaces the 1961 European Social Charter (ETS No. 35) and the 1988 Additional Protocol to the European Social Charter (ETS No. 128) – entered into force on 1 July 1999. It has been signed by 40 of the 46 Council of Europe member states and ratified by 23 but only France and Portugal have accepted all of its provisions.
2. The Parliamentary Assembly underlines that the participants at the 3rd Summit of Heads of State and Government of the Council of Europe in Warsaw on 16 and 17 May 2005 agreed that the European Social Charter should be regarded as the basic core of social rights which all Council of Europe member states should guarantee for their citizens, especially the most vulnerable ones, and that it was also a means of co-ordinating social policies.
3. The Assembly regrets that the various reservations mainly concern the elderly, migration, poverty and social exclusion.
4. It notes that the revised European Social Charter has made a major contribution to the honouring of the commitments entered into by the parties and is pleased that, in most cases, countries have taken steps to bring their domestic situation into line with the Charter.
5. The Assembly recalls that the 1995 additional Protocol acknowledges the right of international and national organisations of employers and trade unions and some non-governmental organisations (NGOs) holding participatory status with the Council of Europe to lodge complaints. Unfortunately, however, only Finland has granted national NGOs this right to date, even though it is NGOs which are most active in defending the rights enshrined in the Charter.
6. The Assembly therefore believes that national NGOs should be more closely involved in the supervisory system, in particular by being allowed to attend the meetings of the Governmental Committee.
7. In Recommendations 1354 (1998) on the future of the European Social Charter and 1415 (1999) on an additional protocol to the European Convention on Human Rights concerning fundamental social rights, the Assembly proposed in particular that individuals should be allowed to lodge complaints, given the right of anyone denied the enjoyment of their rights to appeal to the courts, while pointing out that “there can be no genuine democracy without recognition of all human rights, including social rights”, and that civil and social rights are not just indivisible but also interdependent and complementary.
8. The Assembly also notes and regrets that, in the reports presented by the Commissioners for Human Rights, the social rights set out in the Charter figure far less prominently than rights covered by other human rights instruments, in particular the European Convention on Human Rights (ETS No. 5).
9. The Assembly points out that it was agreed in the Turin Protocol that the members of the European Committee of Social Rights (ECSR) would be subject to the same election rules as the judges of the European Court of Human Rights and is disappointed that no practical measures to this effect have been taken to date.
10. The Assembly underlines the importance of strengthening dialogue between the various organisations, in particular with the International Labour Organization (ILO), and encouraging greater involvement of the social partners, which would enable the Council of Europe to raise its political profile and play a specific role in the area of social rights.
11. The Assembly therefore recommends that the Committee of Ministers:
 - 11.1. take the necessary measures to ensure that member states that have not already done so ratify the revised European Social Charter, the Protocol Amending the European Social Charter and the

Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (ETS No. 158) and grant national NGOs the right to lodge complaints;

11.2. invite the states parties to extend the scope of their undertakings so that the revised European Social Charter can become a reference standard for European social policy and thus help to develop the legislation of Council of Europe member states;

11.3. take the necessary measures to ensure that the members of the ECSR are elected by the Parliamentary Assembly as from the next partial renewal of the committee;

11.4. take account of requests for reimbursement of expenses presented by organisations that have lodged collective complaints;

11.5. establish a working group to consider the possibility of an additional protocol to the Charter providing for a system of individual complaints;

11.6. take the necessary measures to respond to the ever-increasing workload caused by the growing number of states parties and collective complaints;

11.7. ask the Governmental Committee :

11.7.1. to modify its working methods to enable the parties represented there to play a fuller part in the monitoring of undertakings;

11.7.2. to make proposals to the Committee of Ministers, based on the results of the regular supervision process, for the examination of articles of the Charter that need to be updated;

11.7.3. to establish new types of interaction to secure the synergies necessary for the effective application of the Charter;

11.8. ask the Commissioner for Human Rights to pay particular attention to respect for social rights, as provided for in the revised European Social Charter.

12. The Assembly also recommends that the parties to the revised European Social Charter:

12.1. make further efforts to comply with the provisions they have accepted;

12.2. should grant national NGOs the right to lodge collective complaints and involve other NGOs more closely in the regular supervision process.

13. The Parliamentary Assembly also wishes:

13.1. to organise regular debates on social policy to support efforts to increase the Charter's influence on social policy in Greater Europe;

13.2. a revision of its role with a view to becoming a political body for encouraging new initiatives and discussion in the field of monitoring social rights.

14. Finally, the Assembly proposes to hold an annual plenary debate on the activities of the ILO.

B. Explanatory memorandum by Mr Claude Evin, Rapporteur¹

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¹ The Rapporteur is most grateful to Mrs Josephina Leitão for having helped to draft this explanatory memorandum.

I. Introduction

1.1. Ratification of the revised European Social Charter (1996), the European Social Charter (1961) and the first Protocol (1988): current situation

1. The revised Social Charter was opened for signature by Council of Europe member states on 3 May 1996 and came into force on 1 July 1999. Seven years after its entry into force, it has been signed by 40 of the 46 member states and ratified by 23 (Albania, Andorra, Armenia, Azerbaijan, Belgium, Bulgaria, Cyprus, Estonia, Finland, France, Georgia, Ireland, Italy, Lithuania, Malta, Moldova, Netherlands, Norway, Portugal, Romania, Slovenia and Sweden). Of the 23 states that have ratified it, 9 were already bound by the 1961 Charter (Belgium, Cyprus, Finland, France, Ireland, Italy, Malta, Portugal and Sweden). Of the states that have ratified the revised Charter, only France, the Netherlands and Portugal have accepted all the provisions.

2. Even though a significant number of states, and in particular new Council of Europe member states, have ratified the revised Charter, 16 are still bound by the 1961 Charter (Germany, Austria, Croatia, Denmark, Spain, Greece, Hungary, Iceland, Latvia, Luxembourg, Poland, United Kingdom, "The former Yugoslav Republic of Macedonia", Czech Republic, Slovakia and Turkey). This is somewhat surprising, since the 1961 Charter fails to reflect some of the major issues, such as gender equality, reconciling work and family life, ageing population, poverty and exclusion, now facing Europe. The states still bound by this instrument include some of Europe's most developed countries. Nevertheless, the stated objective in the preamble to the revised Charter – that it should progressively take the place of the 1961 Charter – should be achievable in the not too distant future.

3. A first Additional Protocol in 1988 was the first attempt to update the material scope of the 1961 Charter. This protocol introduced four new rights – the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex, workers' rights to be informed and to be consulted within the undertaking and to take part in the determination and improvement of working conditions and the working environment in the undertaking and elderly persons' right to social protection. Even though the protocol is still applicable, its articles have been incorporated into the revised Charter, as articles 20, 21, 22 and 23. Seven states are still bound by this protocol (Croatia, Czech Republic, Denmark, Greece, Netherlands, Slovakia and Spain). Of these, five have accepted all four rights and the remaining two have not accepted elderly persons' right to social protection. From this we conclude that despite differences between countries, there is a solid and broad body of social rights that most European states have undertaken to respect.

1.2. Provisions of the revised Charter that have been accepted and ones that have caused problems at ratification

4. Like its 1961 predecessor, the revised Charter allows states a certain measure of choice of which articles to accept. According to Article A – Undertakings, "*... each of the Parties undertakes: a. to consider Part I of this Charter as a declaration of the aims which it will pursue by all appropriate means, as stated in the introductory paragraph of that part; b. to consider itself bound by at least six of the following nine articles of Part II of this Charter: articles 1, 5, 6, 7, 12, 13, 16, 19, and 20; c. to consider itself bound by an additional number of articles or numbered paragraphs of Part II of the Charter which it may select, provided that the total number of articles or numbered paragraphs by which it is bound is not less than sixteen articles or sixty-three numbered paragraphs.*" Paragraph 3 adds that "*Any Party may, at a later date, declare by notification addressed to the Secretary General that it considers itself bound by any articles or any numbered paragraphs of Part II of the Charter which it has not already accepted ... Such undertakings subsequently given shall be deemed to be an integral part of the ratification, acceptance or approval ...*" Moreover, the revised Charter does not allow states bound by the 1961 Charter or its first protocol to use ratification as a means of denouncing articles that it has previously accepted (Article B§1).

5. The table on articles and paragraphs of the revised Charter accepted by states party shows that the ones that have been universally accepted are Article 1 (right to work), Article 5 (right to organise), Article 7 (right of children and young persons to protection), paragraphs 1 (minimum age of admission to

employment - 15), 2 (minimum age of admission to employment to certain dangerous or unhealthy occupations - 18), 3 (prohibition on employing persons still subject to compulsory education in work that would deprive them of the full benefit of their education), 8 (prohibition of night work for young persons under 18) and 10 (protection of children and young persons against physical and moral dangers, particularly those resulting directly or indirectly from their work), and Article 20 (right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex). All these form part of the so-called core articles of the revised Charter and correspond to the rights in the 1998 ILO Declaration on Fundamental Principles and Rights at Work, which possibly explains this general level of acceptance. However, it should be pointed out that the Declaration includes the right to collective bargaining, which has not been accepted by all the parties to the Charter.

6. The articles and paragraphs that have secured the fewest ratifications are Article 31 (right to housing), 18§2 (simplification of existing formalities and reduction or abolition of chancery dues and other charges payable by foreign workers or their employers), 30 (right to protection against poverty and social exclusion), 13§4 (application of social and medical assistance to nationals of other parties lawfully within the country's territory on an equal footing with its own nationals), 18§2 (liberalisation of the regulations governing the employment of foreign workers) and 23 (elderly persons' right to social protection). The failure of a significant number of countries to accept these provisions, in a Europe characterised by an ageing population, migration, poverty and social exclusion and where promoting social cohesion is one of the main objectives, highlights the need to exploit the machinery in Article 22 of the 1961 Charter – "Reports concerning provisions which are not accepted" – to clarify the problems faced by parties at the time of ratification.

7. In the case of the new parties, that is those that had not formerly ratified the 1961 Charter, the core articles that have been least accepted as a whole are articles 13 and 19, while the least frequently accepted paragraphs are those concerning the application of rights to nationals of other parties.

8. Nevertheless, the new parties have made considerable efforts to accept more provisions of the Charter than the minimum number required for ratification. Moreover, even though it was still possible for them to ratify the 1961 Charter, the majority have opted for the more demanding, though also more modern, revised version - an indication of the perceived importance of this instrument, which is undoubtedly more suited to Europe's current social environment.

9. In the light of the foregoing, and on the basis of Article 22 of the 1961 Charter and Article A paragraph 3 of the revised Charter, the Governmental Committee could make proposals for the Committee of Ministers to invite parties to consider extending their undertakings, so that the revised Charter in its entirety can become the reference standard for European social policy.

10. The Parliamentary Assembly could also hold regular debates on the subject in full session, as already provided for in Article 29 of the Charter, with the participation of the relevant national delegations, and use parliamentary diplomacy to encourage parties to accept additional provisions. In its Recommendation 1354 (1998), the Assembly has already invited the Committee of Ministers to pronounce on a proposed amendment of the final clauses of the Social Charter to make all the core articles obligatory for signatory states (paragraph 23, iv).

11. The gradual application of all the rights embodied in the revised Charter would contribute to social cohesion in Europe and help the Council of Europe to achieve its objective of greater unity between its members.

2. Monitoring compliance with undertakings: a dual system

12. As in the case of other international legal instruments, the revised and 1961 Charters provide for two methods of monitoring member states' compliance with their obligations:

- examination, by the competent bodies, of regular reports by the parties on legal, judicial, administrative and other measures they have taken to implement their accepted provisions (regular monitoring);

- examination of complaints submitted by certain international or national employers' or employees' organisations and certain international, and in some cases national, non-governmental organisations.

13. Monitoring of compliance with the 1961 Charter was initially based solely on the aforementioned regular reports. The situation only changed with the entry into force of the 1995 Protocol to the Charter providing for a system of collective complaints.

2.1. Regular monitoring and its evolution

14. A quarter of a century after the European Social Charter came into force it was clear that it was not achieving the goals it shared with the 1952 European Convention on Human Rights, namely *"the achievement of greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and of facilitating their economic and social progress, in particular by the maintenance and further realisation of human rights and fundamental freedoms"*.

15. The informal ministerial conference on human rights, held in Rome on 5 November 1990, therefore invited the Council of Europe Committee of Ministers *"to take the necessary measures so that a detailed study of the role, contents and operation of the European Social Charter might be undertaken as soon as possible"*.

16. This decision was the start of a genuine revolution in the scope and forms of protection of social rights in Europe, whose impact has not yet been assessed. Two new protocols were drawn up, with a view to improving the monitoring machinery: the Protocol amending the European Social Charter - the so-called Turin Protocol - and the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (1995). Then in 1996, a new Charter emerged, designed to offer a response to new social problems in a rapidly changing Europe without losing sight of the achievements of its predecessor.

17. The fall of the Berlin Wall greatly speeded up the political, economic and social changes that were already under way in Europe and had, and continues to have, an impact on the various European institutions and their law. Recent protocols to the European Convention on Human Rights and the changes taking place within the European Union offer clear evidence of this. The process continues. The decision of the 1991 Rome Conference to launch a detailed study of the European Social Charter is therefore still valid.

2.1.1. The 1991 Protocol amending the European Social Charter

18. According to the explanatory report to the Turin Protocol, from the outset of its work, the Committee responsible for drawing it up, the Charte-Rel Committee, *was unanimous on two preconditions for any significant improvement in the functioning of the Charter:*

- a. *a political will should be clearly expressed in the supervisory process;*
- b. *a substantial and rapid increase in the resources available for implementing the Charter, particularly the resources of the Secretariat, was required.*

19. The first of these conditions implied the adoption by the Committee of Ministers of *political sanctions*, in the form of recommendations – based on Article 29 of the Charter – to states party that failed to comply with their obligations. In fact, until the Protocol came into application, that is for a period of nearly thirty years, no recommendations had been issued to member states. Such a situation removed any credibility the Charter might have had as a means of protecting social rights.

20. However, countries' political will, although necessary, was not sufficient, since the monitoring arrangements in the Charter, as interpreted by the supervisory bodies, were largely responsible for the existing state of affairs. The Charte-Rel Committee's discussion *was therefore devoted for the most part*

to the clarification of the respective powers of the Committee of Independent Experts, now called the European Committee of Social Rights (ECSR) and the Governmental Committee. To rectify the situation described, the Protocol stipulates that the ECSR shall assess from a legal standpoint the compliance of national law and practice with the obligations arising from the Charter for the Contracting Parties concerned, while the Governmental Committee shall prepare the decisions of the Committee of Ministers. In particular, in the light of the reports of the [ECSR] and of the Contracting Parties, it shall select, giving reasons for its choice, on the basis of social, economic and other policy considerations the situations which should, in its view, be the subject of recommendations to each Contracting Party concerned

21. Under the Protocol, therefore, the ECSR carries out legal assessments while those made by the Governmental Committee are essentially based on political criteria. In its assessments, the Governmental Committee must apply social and economic considerations to determine the importance of Charter violations identified by the ECSR, since it has to decide which of them should be the subject of recommendations. Although the Protocol has resolved the problems arising from the overlapping powers and responsibilities of the two supervisory bodies, the distinction between the two types of assessment is not always clear.

22. Another important change concerns the monitoring role of the Parliamentary Assembly. *According to its own representatives [involved in drawing up the Protocol], the role of the Parliamentary Assembly ought to be revised: it should cease to be a supervisory organ in the strict sense of the term and become a political body for stimulation and discussion.* This proposal was reflected in the new Article 29.

23. Apart from these two basic principles underlying the Protocol, the explanatory report mentions the need to reduce the length of the supervisory procedure, improve participation of the social partners within the national framework and make the Charter better known, especially at national level.

2.1.2. Failure of some of the parties to ratify the Protocol

24. The content of the Protocol reflected its underlying objectives. However, it raised problems for certain delegations, which is why it has not yet legally entered into force, since this required it to be ratified by all the parties to the Charter, in accordance with Article 36 – *Amendments*.

25. To overcome this difficulty and help to change the existing situation, on 11 December 1991 the Committee of Ministers adopted a decision on the application of the amending protocol. This requested *the States party to the Charter and the supervisory bodies to envisage the application of certain of the measures provided for in this Protocol before its entry into force, in so far as the text of the Charter will allow.* Following this decision, the articles of the Protocol that can be considered to interpret or recapitulate parts of the Charter have been applied. The interpretative nature of some of the provisions is clearly acknowledged by its authors, as the explanatory report notes: *not all these proposals required amendments to the Charter in order to be implemented.* However, this is not the case with Article 25, paragraph 1, which concerns the election of members of the ECSR by the Parliamentary Assembly. Apart from this provision, the Turin Protocol is, in practice, being applied, as shown by the recommendations made by the Committee of Ministers to parties, in accordance with its provisions. In the light of what has been said, there is no justification for its not being ratified by all the states concerned.

2.1.3. Election of members of the ECSR by the Parliamentary Assembly

26. Article C of the revised Charter specifies that *the implementation of the legal obligations contained in this Charter shall be submitted to the same supervision as the European Social Charter.* This means that the Turin Protocol needs to be ratified by all the states party before it can be applied to the revised Charter.

27. The difficulties faced by the authors of the revised Charter are understandable, given that the same supervisory system had to apply to all the parties on an equal footing. Since the Turin Protocol had not yet been ratified by all the states party to the 1961 Charter when the revised Charter was being drawn

up, the articles governing the regular monitoring system, as amended by the Turin Protocol, could not be incorporated into the new instrument. As a result, the supervisory system laid down in the 1961 Charter in its original version, as interpreted in the December 1991 Committee of Ministers decision, remains in force,

28. Most of the states party to the 1961 or revised Charters are bound by the Turin Protocol. Five ratifications - Germany, Denmark, Luxembourg, United Kingdom and Turkey – are needed for it to come into force and four of these countries have already signed.

29. Although one of the Protocol's objectives – making supervision of Charter obligations more credible – has been achieved by the adoption of the aforementioned Committee of Ministers decision, Article 25 paragraph 1, on the election of members of the ECSR by the Parliamentary Assembly, has still not been implemented and this raises certain problems. The Assembly, which is the clearest expression of the democratic values enshrined in the Council of Europe's Statute, must be more closely involved in the Social Charter, particularly through the election of the committee.

30. Under Article 22 of the European Convention on Human Rights, judges of the European Court of Human Rights are elected by the Parliamentary Assembly. The principle of the indivisibility of human rights requires the selection of members of the ECSR to be governed by the same rules to ensure, at least in this area, a gradual harmonisation of the two supervisory systems. It should also be noted that the Assembly elects the Commissioner for Human Rights.

31. The Protocol therefore has to be ratified by all the state parties. The current situation is incompatible with the principle of legal certainty and is simply an interim solution to a particular set of circumstances, which have now changed. For all these reasons, the Committee of Ministers and the Parliamentary Assembly must make diplomatic efforts to persuade countries that have not yet done so to ratify the Protocol, to give it full legal force.

2.2. Monitoring through the submission of complaints

32. The right to present individual or collective complaints/applications/communications (the terminology varies according to international organisation and instrument) appears in several international human rights treaties. However, a distinction is traditionally drawn between civil/political and social/economic rights. In the case of the former, individual applications are generally accepted, whereas the equivalent remedies for economic and social rights are collective complaints. Nevertheless, as we shall see, the situation has started to change.

2.2.1. The Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (1995)

33. Together with the Turin Protocol and the revised Charter, the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, which was opened for signature and ratification on 9 November 1995 and came into force on 1 July 1998, is one of the instruments to emerge from the Rome conference. Its aim was to encourage and secure the effective enforcement of social rights by supplementing the system of periodic assessments of situations described in national reports with a form of appeals procedure, involving "parties" and challenges to the states concerned, and thus the introduction of the adversarial principle. The aim was essentially to secure greater involvement of the social partners and NGOs in the regular supervisory process.

34. Although the explanatory report has nothing to say on the subject, the Collective Complaints Protocol has introduced a new, almost judicial, element into the supervisory machinery. In contrast to its national report-based monitoring, other than in exceptional circumstances that have not so far occurred the ECSR's decisions on collective complaints no longer have to pass through the filter of the Governmental Committee but go directly to the Committee of Ministers. Since the latter's functions are political rather than judicial, its resolutions do not imply any questioning of the ECSR's findings. They merely confine themselves to establishing whether, after the adoption of conclusions, changes in the

situation justify the ECSR's decision. Moreover, according to the explanatory report, *the Committee of Ministers cannot reverse the legal assessment made by the Committee of Independent Experts. However, its decision (resolution or recommendation) may be based on social and economic policy considerations.* The Protocol's main objective of moving towards a judicial-type system could not be more explicit.

35. The collective complaints arrangements introduced in the 1995 Protocol are based on the existing ILO system. Articles 24 and 25 of the ILO Constitution authorise industrial associations of employers or workers to make representations to the Organisation's Governing Body concerning any member state that *has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party. A tripartite committee of three members of the Governing Body may be established to examine the representation and the response of the government. The report that the committee submits to the Governing Body states the legal aspects of the case, examines the information submitted and concludes with recommendations. Where the response of the government is not considered to be satisfactory, the Governing Body is entitled to publish the representation and the response.* Clearly, there are similarities between the two systems, although we believe that by giving the ECSR quasi-judicial powers, the Protocol represents a further step forward.

36. Although the committee that drafted the protocol adopted a similar system to the ILO one, it refused to accept the system of complaints provided for in Articles 26 to 34 of the ILO Constitution under which members that have ratified a particular convention, Conference delegates and the Governing Body *ex officio* may file complaints against other states that have ratified the convention, though the subject was discussed.

37. It also rejected the notion of individual complaints. According to the explanatory report, *because of their "collective" nature, complaints may only raise questions concerning non-compliance of a state's law or practice with one of the provisions of the Charter. Individual situations may not be submitted.* The Parliamentary Assembly, in contrast, did envisage this option as far back as 1978, in its Recommendation 839.

38. The arrangements laid down in the Protocol are very simple. They are essentially concerned with answering two questions: who can present complaints and what procedure should they follow? All other matters should be settled either in the Committee's rules of procedure or in its case-law. However, from the outset of the Protocol's application this admittedly highly attractive simplicity has raised problems that have had to be clarified as complaints have emerged.

2.2.2. Organisations entitled to submit complaints

39. The parties to the Collective Complaints Protocol acknowledge the right of international organisations of employers and trade unions which, on the basis of Article 27 of the Charter, attend meetings of the Governmental Committee in a consultative capacity, to submit complaints alleging unsatisfactory application of the Charter. These organisations currently include the Union of Industrial and Employers' Confederations of Europe - UNICE, the International Organisation of Employers - IOE, and the European Trade Union Confederation - ETUC, as well as the INGOs which have consultative status with the Council of Europe and have been put on a list for this purpose by the Governmental Committee. Representative national organisations of employers and trade unions within the jurisdiction of the contracting party concerned are also entitled to lodge complaints. The Protocol also states that *any Contracting State may also, when it expresses its consent to be bound by this Protocol, (...) or at any moment thereafter, declare that it recognises the right of any other representative national non-governmental organisation within its jurisdiction which has particular competence in the matters governed by the Charter, to lodge complaints against it* (Article 2 paragraph 1).

40. In this connection, it should be pointed out that of the 14 parties to the Protocol, only one – Finland – has given national NGOs the right to lodge complaints. Given that these organisations must have specific experience in applying the Charter in fields that do not concern employment – in which

organisations of employers and trade unions obviously have the most experience – member states' lack of interest in using the above-mentioned provision is very surprising.

41. In his report "*Council of Europe – European Union: a sole ambition for the European continent*", Jean Claude Juncker, the Prime Minister of Luxembourg, says "*Democracy cannot exist without a strong civil society which helps to satisfy collective needs in a manner which complements the efforts of the authorities and makes sure that these efforts are transparent and responsible*". It is necessary to take appropriate action and acknowledge that the values of democratic and social progress on which the Council of Europe is founded require greater participation by civil society. It is therefore necessary for states to change their standpoint with regard to national NGOs and no longer take a defensive approach but engage in active co-operation with them, notably by giving them the right to lodge complaints in the event of unsatisfactory application of the Charter.

42. Only representative organisations which have particular competence in the matters governed by the Charter are entitled to submit complaints. We find it difficult to understand why such organisations must be "representative", given that the concept is, as a rule, only used in respect of trade unions and is linked, among other things, to the number of members. Although the ECSR has not yet had the opportunity to give its interpretation of the concept, it obviously refers to NGOs with relevant activities in the field of social rights, in other words, who are active and have particular competence in matters governed by the Charter.

2.2.3. The rules of procedure

43. As we previously mentioned, the Collective Complaints Protocol says very little about procedural rules and consequently the ECSR has expanded on these rules in its own Rules of Procedure. Although this has helped to eliminate certain ambiguities, given the quasi-judicial nature of the collective complaints procedure the rules stipulating that the procedure must be adversarial should be part of the Protocol itself. Indeed, both parties should be entitled by law to present their points of view on an equal footing.

44. It is true that the Protocol does not really deal with this aspect, but in practice the procedure has become a quasi-judicial one. It was no coincidence that the ECSR replaced the word "conclusions" in Article 8, paragraph 1, of the Protocol, by "decision" in its Rules of Procedure (Article 34). As a result the judicial dimension of the procedure is clearer and there is more emphasis on how it differs from the normal system of supervision, in respect of which the ECSR has retained the word "conclusions".

45. In view of this development, the possibility of conducting enquiries should be considered and, in exceptional cases, there should be a right of appeal against decisions, with a view to bringing the complaints procedure closer to that of applications under the ECHR (Article 34).

2.2.4. Assessment of the first eight years

46. According to the explanatory report, the introduction of a system of this type *was designed to increase the efficiency of supervisory machinery based solely on the submission of governmental reports. In particular, this system should increase participation by management and labour and non-governmental organisations.* The procedure provided for in the Protocol was also intended to be shorter than that for examining reports and was *to be seen as a complement to the examination of governmental reports, which naturally constitutes the basic mechanism for the supervision of the application of the Charter.*

47. Eight years after the Protocol's entry into force, how far have these objectives been achieved? Firstly, it has undoubtedly made the monitoring machinery more effective. The Committee of Ministers' resolutions that close each set of collective complaint proceedings show that in the majority of cases the countries in question have taken steps to bring their domestic situation into line with the Charter, thus avoiding the need for a recommendation. This is a very positive situation, and one that has applied since the first complaint. However the restricted number of ratifications – fourteen – limits the scope of that effectiveness.

48. A close look at the list of organisations which have submitted complaints shows that the majority are international NGOs (INGOs), followed by national organisations of employees, in particular French trade unions, and international employees' organisations. Only one employers' organisation, a national one, has submitted a complaint. No national NGOs have lodged any complaints.

49. It appears that of all the organisations submitting complaints, INGOs are the most active in defending the rights enshrined in the Charter. They should therefore be more closely involved in the supervisory system, in particular by attending the meetings of the Governmental Committee, as provided for in Article 27 of the Charter, paragraph 2 in the Turin Protocol version.

50. It can also be seen that a relatively small number of INGOs have submitted complaints and that most of the national trade unions which have done so are from one particular country. We therefore believe that more prominence should be given to this mechanism so that it can be used by all those concerned, thus broadening the monitoring of commitments entered into by the parties and ensuring greater uniformity in the application of the Charter in all contracting states.

51. One issue worth studying is the reimbursement of the expenses of organisations which submit complaints. In complaint 1/1998, the International Commission of Jurists, with the backing of the ECSR, asked for reimbursement of its expenses. The Committee of Ministers refused. This decision may have had an influence on later complaints as such requests are seldom made. The small number of requests that have been made have also been rejected. As there is no article in the Protocol governing this question, unlike in the ECHR, it is difficult to secure the reimbursement of expenses. Account should, however, be taken of the fact that some of the organisations entitled to submit complaints do not have the financial and human resources to do so and that organisations which submit complaints because they wish to promote social rights should not be penalised.

52. The Protocol was also designed to introduce a faster monitoring procedure than that used to examine reports. The duration of the procedure varies from one case to another, but the average time taken from the registration of a complaint to the Committee of Ministers' final resolution is approximately one and a half years. The objective has therefore been met.

53. Initially, the Protocol raised several problems of interpretation owing to the over-simplified wording used. However, thanks to the Rules of Procedure of the ECSR and its well established case-law, the lacunae have been addressed and most of the difficulties have been resolved, which is one reason why the Protocol should remain as it stands.

3. Results of the supervisory system as a whole

54. In both the regular supervisory system and the complaints procedure, the Committee of Ministers adopts a resolution and, if a majority of two-thirds of those voting (with entitlement to vote limited to the contracting parties) find that the Charter has not been applied in a satisfactory manner, it adopts a recommendation addressed to the contracting party concerned.

55. In the regular supervisory system, the ECSR has to *assess from a legal standpoint the compliance of national law and practice with the obligations arising from the Charter for the Contracting Parties concerned* and adopt relevant *conclusions*. This assessment is based on the reports submitted by the parties and the comments on these reports by the national organisations which are members of the international employers' organisations and trade unions which attend meetings of the Governmental Committee as observers, on replies to any requests for information or further clarification, or on meetings with the representatives of a party, at its own initiative or that of the ECSR.

56. Once the ECSR has issued its *conclusions*, the parties' reports and the comments and information mentioned in the previous paragraph are forwarded to the Governmental Committee, which must then select, giving reasons for its choice, on the basis of social, economic and other policy considerations, the situations which should be the subject of recommendations to each contracting party concerned.

57. The Governmental Committee does not intervene in the complaints procedure, save in exceptional cases. This committee may only be consulted if three conditions are met: the party concerned must request its intervention, the ECSR's report must raise new issues and the Committee of Ministers' decision on this subject must be adopted by a two-third majority. Consequently, responsibility for assessing whether the contracting party against which a complaint is lodged by an organisation has satisfactorily applied the provision of the Charter in question lies with the ECSR.

58. There are three stages to the ECSR's work: firstly it assesses the admissibility of the complaint, then it assesses the merits and finally it forwards the report containing the decision on the merits to the parties to the procedure and to the Committee of Ministers.

59. Firstly, prior to taking its decision, the ECSR *may request the Contracting Party concerned and the organisation which lodged the complaint to submit written information and observations on the admissibility of the complaint within such time-limit as it prescribes.*

60. *If it decides that a complaint is admissible, it requests the Contracting Party concerned and the organisation which lodged the complaint to submit, within such time-limit as it prescribes, all relevant written explanations or information, and the other Contracting Parties to this Protocol, the comments they wish to submit, within the same time-limit. If the complaint has been lodged by a national organisation of employers or a national trade union or by another national or international non-governmental organisation, the ECSR notifies the international organisations of employers or trade unions sitting on the committee as observers, through the Secretary General, and invites them to submit observations within a prescribed time-limit.*

61. This procedure is, as a rule, a written procedure, although the ECSR may hold a hearing with the representatives of the parties.

62. Thirdly, the ECSR drafts a report in which it describes the steps taken to examine the complaint and consider its decision. This report is forwarded to the Committee of Ministers and to the parties to the proceedings, which may not publish it. It is also transmitted to the Parliamentary Assembly and made public at the same time as the resolution referred to in Article 9 or no later than four months after it has been transmitted to the Committee of Ministers.

3.1. Results of the regular supervisory system

3.1.1. The ECSR's conclusions

63. The results of the ECSR's assessment of the conformity of national legislation and practice with the accepted provisions of the Revised Charter and the 1961 Charter, together with its conclusions, are published annually.

64. The following tables present a summary of these results in all of the states party to the Revised Charter and the 1961 Charter, for 2005, 2004 and 2003. The data are taken from Conclusions 2005, 2004 and 2003 and Conclusions XVII-2, XVII-1 and XVI-2. Certain factors vary from year to year: the number of states party to the two instruments mentioned, the number of provisions examined and the provisions selected, following fresh ratifications and transitions from one instrument to the other, the number of provisions accepted and the rules on the presentation of reports. It is therefore difficult to make a comparative analysis of the results obtained for each of the years under consideration. However, a number of conclusions may be drawn which are worth commenting on.

Revised European Social Charter
Summary of the results of the examination of reports
(2005, 2004, 2003)

Year	2005		2004		2003	
Conclusions						
Total	304	100%	377	100%	287	100%
Conformity	107	35.2%	176	46.7%	90	31.4%
Non-conformity	42	13.8%	91	24.1%	58	20.2%
Deferred	155	51.0%	110	29.2%	139	48.4%

65. First of all, it can be seen that in the three years under consideration, a very significant percentage of conclusions were deferred. This is certainly due to the fact that the majority of the parties had only recently ratified the Revised Charter and did not yet have all the data required on the form sent out by the ECSR or in accordance with its case-law, and as a result the ECSR was unable to draw up conclusions on whether the provision concerned had been satisfactorily applied because it had received little or no information.

66. The percentage of cases in conformity with the Revised Charter is relatively high, especially in 2004, the year in which the reports concerned the core articles. Although the percentage of cases of non-conformity is lower than the percentage of those in conformity, it is nevertheless higher than it should be. This can be explained, in part, by the fact that some provisions were accepted because a number of changes were about to be made to laws and regulations at the time of ratification but had not yet been adopted when the report was drafted. They will, however, be adopted at a later date, thus bringing the situation into line with the Charter. There are also cases in which the parties' assessment of the situation at the time of acceptance differs from that of the ECSR.

European Social Charter (1961) and Additional Protocol (1988)
Summary of the results of the examination of reports (2005, 2004, 2003)

Year	2005		2004		2003	
Conclusions						
Total	379	100%	336	100%	458	100%
Conformity	191	50.4%	190	56.5%	178	38.9%
Non-conformity	79	20.8%	85	25.3%	112	24.4%
Deferred	109	28.8%	61	18.2%	168	36.7%

67. The conclusions concerning the 1961 Charter (which also include the Additional Protocol of 1988) in respect of the parties which have ratified it, show that, compared to the Revised Charter, the number of cases of conformity is higher in the three years under study, while there are fewer of cases of non-conformity and deferral. There are three possible explanations for this: the Revised Charter is more demanding than the 1961 Charter; most of the parties to this instrument ratified it many years ago and have therefore had the time to bring their legislation and practice into line with its requirements; their authorities have taken the necessary steps to obtain the information requested. Nevertheless, it was not until 2004, the year when the reports concerned the core articles, that the number of cases of conformity reached 56.5%. This means that the parties need to make further efforts to honour the commitments entered into.

3.1.2. Governmental Committee monitoring of the Charter's application: progress and problems

68. According to the Charter, once the ECSR has issued its conclusions, the Governmental Committee must draw up a report on the action taken in response to these conclusions and submit it to the Committee of Ministers.

69. To help carry out this work, the Governmental Committee has drawn up rules which have been incorporated into its Rules of Procedure and its Working Methods. The latter state that *the Committee considers the conclusions of the ECSR provision by provision and takes a vote in respect of each negative conclusion (...)*. The vote is on whether to suggest that a recommendation be addressed to the state concerned. Where there is no majority in favour of a recommendation, the Committee will then also take a vote on whether to address a warning to the state concerned. Where neither a recommendation or a warning is proposed, the Committee may find it necessary to express an opinion on the situation or on the conclusion of the ECSR in its report to the Committee of Ministers..

70. The Governmental Committee has therefore introduced a whole range of more or less flexible measures, designed to oblige the parties to honour the commitments they have accepted. The Committee decides which steps should be taken. However, there are criteria to help decide what these measures should be. As a rule, they take account of such factors as the importance of the violated provision within the Charter as a whole, the time elapsed without the party managing to solve the problem, the number of people affected and the seriousness of the violation.

71. To assess the results of the regular supervisory system, it is necessary to consider the action taken by the Governmental Committee in response to the ECSR's negative conclusions during the period under consideration, based on an analysis of the reports submitted to the Committee of Ministers.

Revised European Social Charter
Summary of the action taken by the Governmental Committee in response to the ECSR 's
Conclusions
(2005, 2004, 2003)

Year	2005	2004	2003
Proposals to the Committee of Ministers and warnings			
Recommendations	None	None	None
Renewed recommendations	No renewed recommendations	No renewed recommendations	2 Italy
Warnings	1 Ireland	1 Slovenia	1 France
Committee of Ministers Resolutions	Resolutions ResChs (2006) 1 and 2	Resolution ResChs (2005)5	Resolution ResChs (2004)3

72. The Governmental Committee's reports on Conclusions 2005, 2004 and 2003 concerning the Revised Charter show that the Governmental Committee did not propose any recommendations and that the two renewed recommendations, proposed in 2003, concerned only one country, Italy, which had made the transition from the 1961 Charter to the Revised Charter. The recommendations which were renewed concerned Article 3, paragraph 3 (*prescribed measures for supervising the application of industrial safety and health regulations – lack of statistical information on the activities of local health authorities – not provided since the 6th supervision cycle*) and Article 4, paragraph 4, (*reasonable period of notice of termination of employment – excessively short periods of notice in some economic sectors*).

73. As the majority of parties to the Revised Charter are states which have no experience of applying the 1961 Charter, it would appear that the Committee wished to give them time to bring their domestic situation into line with the requirements.

74. There were three warnings over the period under consideration: a 2nd warning was issued to Ireland for being late in submitting its report; another was issued to Slovenia for failing to comply with Article 19, paragraphs 8 and 10 (*workers can be expelled if they do not have sufficient financial resources*); and a third was issued to France for failing to comply with Article 4, paragraph 4, (*the*

maximum legal period of notice for termination of employment (2 months) was held to be insufficient in the case of employees who had worked for a long time for the same employer).

75 Apart from these aspects, it can be seen from the reports that, in response to a negative conclusion, most of the parties took, or said that they would take, measures to bring the situation into line with the Charter. States therefore have clear political resolve to honour the commitments they have accepted.

**European Social Charter (1961) and Additional Protocol (1988)
Summary of the action taken by the Governmental Committee
in response to the ECSR's conclusions (2005, 2004, 2003)**

Year	2005	2004	2003
Proposals to the Committee of Ministers and warnings			
Recommendations	None	1 United Kingdom	None
Renewed recommendations	No renewed recommendations	No renewed recommendations	1 Ireland
Warnings	1 Luxembourg 2 Turkey	1 Portugal, 3 Turkey, 1 United Kingdom, 1 Austria	2 Spain 1 Slovak Republic, 1 Ireland, 1 Luxembourg
Committee of Ministers Resolution	Resolution ResChs (2006)1	Resolution ResChs (2005)4	Resolution ResChs (2004)2 and (2005)3

76. In its reports on Conclusions XVII-2, XVII-1 and XVI-2 relating to the 1961 Charter, in respect of 2005, 2004 and 2003, the Governmental Committee proposed that a recommendation be addressed to the United Kingdom as it had failed to comply with the obligations deriving from Article 6 paragraph 4 of the Charter (*insufficient protection of striking employees against dismissal*) and that another recommendation, concerning Article 4, paragraph 4 (*insufficient notice of termination of employment*) be renewed - it had already been addressed to Ireland, which had failed to take the necessary action,.

77. Given the number of negative conclusions listed in the above table, the Governmental Committee appears to have taken very little action. However, the parties' response to a negative conclusion is, as a rule, to bring the situation into line with the Charter, thus avoiding the need to ask the Committee of Ministers to address a recommendation to the country concerned. In some cases the Committee of Ministers rejected the recommendations proposed by the Governmental Committee, for example because the party concerned had, meanwhile, remedied the situation. The renewed recommendations give more cause for concern. A renewed recommendation is a sign that the supervisory system, as a whole, has failed, because it casts doubt on the effectiveness of all the supervisory bodies. The Governmental Committee should therefore provide sound justification for the recommendations it proposes so as to avoid any objections.

78. Fourteen warnings were issued during the three years under consideration:

- five addressed to Turkey, concerning Article 1, paragraph 2 (*insufficient anti-discrimination legislation; legislation barring nationals of other contracting parties from several categories of jobs, and the Code of Commerce authorising the captain of a ship to use force in order to bring sailors back on board*), Article 7, paragraphs 8 and 9 (*the scope of legislation governing child labour was more restricted than that of the Charter*) and Article 19, paragraphs 6 and 10 (*refusal of family reunion on health grounds of persons concerned*);
- two addressed to Luxembourg for failing to submit its reports in time;

- two addressed to Spain, concerning Article 4 paragraph 2 (*no legislation to ensure that workers receive an increased rate of pay or an equivalent rest period in compensation for overtime*) and Article 4 paragraph 4 (*insufficient period of notice of termination of employment in the case of fixed-term contracts of more than one year*);
- one addressed to Austria, concerning Article 12 paragraph 4 and Article 16 (*discrimination against the nationals of the other contracting parties*);
- one addressed to Ireland for failing to submit its report in time;
- one addressed to Portugal, concerning Article 1, paragraph 2 (*the Merchant Navy Penal and Disciplinary Code, providing for sanctions against seafarers who abandon their posts*);
- one addressed to the Slovak Republic, concerning Article 4, paragraph 4 (*insufficient period of notice of termination of employment in the case of workers with a length of service of 15 years or more*);
- one addressed to the United Kingdom concerning Article 6, paragraph 4 (*the scope for workers to defend their interests through lawful collective action was excessively circumscribed*).

79. The results of the regular system for monitoring the application of the revised Charter and the 1961 Charter show that, although some of the breaches of the Charter were not very serious, some fundamental rights are still not respected by all parties. Solutions must therefore be found to make this system more effective.

3.2. Results of the Collective Complaints Protocol

80. To make it possible to compare the results of the two control mechanisms, the following table relates only to complaints registered between 2003 and 2005.

**Table showing the follow-up to registered complaints
(2005, 2004, 2003)**

Year			
Complaints	2005	2004	2003
Registered	4	5	10
Inadmissible	1	1	0
Admissible	3	4	10
Non-violation	No decision yet	4	8
Violation	No decision yet	3	12
Committee of Ministers Resolutions	No resolution yet	ResChS (2006)4, (2005)14 and (2005)13	ResChS (2004)6, (2005)8, (2005)2 (2005)1, (2005)9, (2005)12, (2005)7 (2005)11 and (2005)6

81. Although there were not very many collective complaints in the three years under consideration, the proceedings have given the Charter a higher profile and, where violations have been found, this has prompted the parties concerned to bring their law and practice rapidly into line with the Charter. It is rarer for this to happen in respect of conclusions issued under the regular monitoring system, as borne out by the list of repeated conclusions of non-conformity appended to the reports of the Governmental Committee. Furthermore, applying the rules of the Charter to actual cases has enabled the ECSR to build up a body of case-law that is more in tune with real circumstances than the regular monitoring system.

**Collective complaints
Rights alleged to have been violated
(2005, 2004, 2003)**

2005	2004	2003
Right to strike (Article 6§4)	Right to non-discrimination in employment (Article 1§1)	Right to organise and to bargain collectively (Articles 5 and 6)
Right of the family to social, legal and economic protection and right to non-discrimination (Articles 16 and E)	Right to housing and to non-discrimination (Articles 31 and E)	Right to just conditions of work, to health and safety at work and to health protection (Articles 2, 3 and 11)
Right to health protection, to a reduction of working hours or additional paid holidays for workers engaged in dangerous or unhealthy occupations and to health and safety at work (Articles 11, 2§4 and 3 §§1 and 3)	Right to organise and to non-discrimination (Articles 5, E, G and I)	Right of children to protection against violence (corporal punishment) (Article 17, Social Charter and revised Charter)
Right to organise	Right to bargain collectively (Article 6§§ 1 and 2)	Right to just conditions of work, equal pay, collective bargaining and equal opportunities and treatment for workers with family responsibilities (Articles 2, 4, 6 and 27)
	Right to non-discrimination in employment (Article 1§2)	Right of the family to social, legal and economic protection and right to non-discrimination in housing (Article 16 and Preamble)
		Right to social and medical assistance, social, legal and economic protection for children and adolescents and non-discrimination (Articles 13, 17 and E)

82. As the table shows, the questions which have prompted the most interest from organisations filing complaints are discrimination, family law, social, legal and economic protection, housing, children's rights, working conditions, health and collective employment rights.

4. Making the Charter more effective under the current system: a new architecture for the supervisory bodies

83. In the Final Declaration of the Warsaw Summit of 16 and 17 May 2005, which set the Council of Europe's main tasks for the years to come, the Heads of State and Government acknowledged the "importance of the European Social Charter" and supported the member states' "efforts to increase its impact on the framing of our social policies". They also expressed their determination "to build cohesive societies by ensuring fair access to social rights, fighting exclusion and protecting vulnerable social groups".

84. To accompany the Declaration, an Action Plan was adopted, in which it was stated that "the Council of Europe will step up its work in the social policy field on the basis of the European Social Charter and other relevant instruments. The central task is to jointly define remedies and solutions which

could be effective in fighting poverty and exclusion, ensuring equitable access to social rights and protecting vulnerable groups".

85. The Summit therefore regarded the European Social Charter as a basic core of social rights which all the Council of Europe member states should guarantee to their citizens, especially the most vulnerable ones. The Action Plan also underlined the importance of the Charter as a means of co-ordinating social policies, implying a new view of the role of the Charter, putting an end to certain traditions and habits adopted by the states party or the supervisory bodies.

86. To make the Charter more effective, the Turin Protocol separated the supervision of the legal and political aspects of its application by assigning the ECSR the task of monitoring compliance with commitments and the Governmental Committee that of extending the Charter's influence on social policies, a natural role for it as a body made up of government representatives. The practices of these two supervisory bodies do not, however, always reflect this approach as, in social law, legal and socio-economic aspects are not hermetically sealed from one another; on the contrary, these days, they are more and more interlinked. While retaining their specific roles, the two supervisory bodies should therefore be interacting positively to enable the Charter to act both as a guardian of social rights and as a driving force for social policies, including new legislation, in Europe.

87. One of the main ways to achieve this is for the Governmental Committee to change its working methods. Its main function should not be to consider the ECSR's conclusions article by article and vote on each negative conclusion. Instead it should be looking more at the broader picture than the details, in other words it should be considering the conclusions by subject matter with social and economic policy in mind.

88. Examining the conclusions article by article creates a huge workload and fails to produce obvious results, as noted above. Furthermore, the ever increasing number of conclusions resulting from the accession of new parties will soon make this system unmanageable. Lastly, it has to be said that in practice this working method has led to the Governmental Committee being viewed – incorrectly - as an appeal body against ECSR conclusions of non-conformity, resulting in the adoption of adversarial tactics to justify the situations being criticised.

89. If the Governmental Committee's working methods are to be changed, the "open method of co-ordination" used by the European Union in its European Employment Strategy (EES) may serve as a source of inspiration. The key concepts of convergence, mutual learning, an integrated approach and management by objectives can of course be borrowed and duly adapted from these methods and this may prompt the Governmental Committee and the governments themselves to adopt a less defensive and more proactive approach. The new system for the presentation of reports, already approved by the Committee of Ministers, may also help to achieve this goal.

90. The Governmental Committee is also required to draw on its findings on the implementation of the Social Charter in general *"to submit proposals to the Committee of Ministers aiming at studies to be carried out on social issues and on articles of the Charter which possibly might be updated"*. Article 27 is a coherent whole, meaning that all of its paragraphs should be applied. This is an area in which it is possible to imagine a degree of positive co-operation between the Governmental Committee and the ECSR. There is a need to identify potential areas of joint activity for the two Committees, fostering dialogue and creating new synergies. For example, at least once a year, at the end of each supervision cycle, the two Committees should meet to talk about the difficulties encountered and the progress made in the implementation of the Charter in general.

91. The current rules have a potential which, it seems to us, has not yet been fully exploited, but that does not mean that we should not try to improve them.

92. One possible improvement lies in the architecture of the supervisory bodies. Through Protocol No. 11 to the European Convention on Human Rights (1994), the Council of Europe has radically reorganised the control mechanism set up by the Convention. The European Commission of Human

Rights has ceased to exist and the European Court of Human Rights has had its role strengthened so that it is now the sole arbiter of compliance with the Convention. While bearing in mind the differences between the two systems, should we be taking the same approach to the supervisory bodies for the European Social Charter?

93. Questions about the future of the Governmental Committee were raised when the Turin Protocol was drawn up and it was unanimously decided that it should be retained. Fifteen years on, would the decision be the same?

94. In an ideal world, as the European Commissioner for Human Rights said very recently, there would be no European Social Charter as its main provisions would have been incorporated into the European Convention on Human Rights. There is, after all, no real justification for two separate conventions, one covering civil and political rights and the other economic and social rights, as these are indissociable human rights. By the same reasoning, neither should there be two separate control mechanisms to ensure that they are complied with. However, despite major progress towards the harmonisation of the two conventions – as reflected in the adoption and entry into force of Protocol No. 12 to the ECHR (2000) and the case-law of the Court and the ECSR – a merger of the two conventions and hence of their control mechanisms is not likely in the very near future. Consequently, while we do not wish to question the welcome trend towards increased protection of social rights, it seems to us that the current overall architecture of the Charter's supervisory bodies should be retained, provided that the working methods of the Governmental Committee and the arrangements for co-operation between the supervisory bodies are altered in the way that we suggest above.

5. Possible establishment of an individual applications system, as in other international legal instruments

95. Some United Nations instruments make provision under certain circumstances for individuals or groups of individuals who consider themselves to be victims of a state party to one of these instruments to submit communications to supervisory bodies. This is the case with the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the Optional Protocol to the International Covenant on Civil and Political Rights (1966), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) and the Optional Protocol to the Convention on the Elimination of Discrimination against Women (1999). Some of these instruments also allow a state party which alleges that another state party is not honouring its commitments to submit communications under certain circumstances.

96. These instruments mainly cover civil and political rights but, as there is no real difference between economic and social rights and civil and political rights, they sometimes relate to social rights.

97. For all these instruments, compliance with commitments is supervised by two bodies, as with the Charter, and based on the examination of regular reports by the states party and any communications they may submit. This dual review is carried out by committees of experts (the same for reports and communications) of acknowledged good character, skill, impartiality and independence, elected by secret ballot and acting in their personal capacity.

98. The United Nations Pact on Economic, Social and Cultural Rights is monitored only by means of regular reports. As a result, following the World Conference on Human Rights (Vienna, 1993), where it was reiterated that all human rights were universal, indivisible, interdependent and intimately linked, the Commission on Human Rights and the Economic and Social Council agreed in 2003 to set up a working group of the Commission to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights.

99. The working group, which is made up of representatives of member states and non-member states of the Commission on Human Rights, of the United Nations specialised agencies, bodies, programmes and institutions (ILO, UNCTAD, UNESCO, UNAIDS, WFP, WHO) and of INGOs, has discussed the drawbacks and advantages of adopting an optional protocol for the implementation of

social rights. While it has not yet completed its work, after three working sessions, there seems to be some consensus in the working group about adopting a protocol enabling individuals or groups of individuals to lodge complaints of alleged violations by states of one of the articles of the Covenant.

100. At the Council of Europe, the possibility of allowing individual applicants and/or governments to file complaints or applications against a party to the Charter which has failed to honour its commitments has long been a subject of discussion, particularly in the Parliamentary Assembly, which has drawn up several recommendations on the subject. All these texts emphasise that there can be no real democracy unless all human rights, including social rights, are secured and that civil and social rights are not just indivisible but also interdependent and complementary. All human rights must therefore be afforded the same protection, irrespective of how they have traditionally been categorised. Accordingly, anyone who is denied the enjoyment of these rights must be able to appeal to the courts.

101. Two of the suggested means of securing this right have been to set up a European Court of Social Rights (Parliamentary Assembly Recommendation 1354 (1998), paragraph 8) or to incorporate fundamental social rights into the European Convention on Human Rights. As a result, the social rights enshrined in the Charter, or at least some of them, would enjoy judicial protection (Parliamentary Assembly Recommendation 1415 (1999)).

102. In this connection, a report of March 1999 entitled "Additional Protocol to the European Convention on Human Rights concerning fundamental social rights" points out that the rights to be protected "*must be as tangible and enforceable as possible, and be defined precisely enough to be relied upon by applicants to the Court*" (paragraph 53). For this reason, it is considered "*appropriate to make a record of the rights which appear in member states' national constitutions, and that are considered by national constitutional courts as enforceable*" (paragraph 54). Cases can be brought to the European Court of Human Rights only once all domestic remedies have been exhausted (Article 35§1 of the ECHR) and this only occurs if the rights in question can form the subject of proceedings in the national courts.

103. In its reply of 20 April 2001 to Recommendations 1354 and 1415, the Committee of Ministers stated as follows: "*The Committee of Ministers is not at this stage in favour of setting up a European court of social rights or of introducing an individual right to lodge complaints under the Charter. ... As to the inclusion of some of the rights contained in the Charter in the European Convention on Human Rights, the Committee of Ministers, while not excluding this possibility in due course, considers that priority should be given to consolidating the enhanced mechanisms of the Charter*".

104. Five years on, the context at the Council of Europe and at European Community and international level has changed. A very large number of member states have ratified the revised Charter and the Collective Complaints Protocol has made a major contribution to the effective implementation of social rights. As far as the ECHR is concerned, Protocol No. 12, establishing a general prohibition on discrimination, is now in force and Protocol No. 14, amending the Convention's control system, has been adopted. At European Union level, accession to the European Convention on Human Rights is planned and although the adoption of the draft Constitution for Europe is still subject to debate, it includes the EU Charter of Fundamental Rights, which drew on the revised Social Charter.

105. At United Nations level, an Optional Protocol to the International Covenant on Economic, Social and Cultural rights granting the right of individuals or groups to submit communications is being drawn up and there is a good chance that it will be adopted.

106. In view of these developments, there is a need to improve the mechanisms designed to monitor the application of the Charter. The European Convention on Human Rights, which has progressively improved its control mechanisms through the adoption of successive protocols, seems to us to be a good example to follow and so we would recommend that a protocol making provision for individual applications should be adopted.

107. The content of this protocol is still open to discussion. The solutions proposed in Assembly Recommendations 1354 and 1415 provide an excellent working basis. However, in our opinion, the

establishment of a European Court of Social Rights to process individual applications in cases of alleged violations of the Charter is not the right option in the current context because recent changes at the ECHR, particularly with the entry into force of Protocol No. 12, seem to mark a trend towards a broader jurisdiction for the Court, taking in social rights. Establishing a separate court for social rights might be a source of conflict, which would undermine the two control mechanisms and conflict with the principle of the indivisibility of human rights.

108. As to the possibility of incorporating some of the Charter rights that are not set out in the Convention or covered by its case-law into an Additional Protocol to the ECHR (Recommendation 1415), we believe that it will be difficult to single out the rights to be included. The principle of the interdependence and complementarity of human rights applies not only to the relationship between civil and social rights but also to the rights within each category.

109. This does not mean that the idea of having a core of social rights with extra protection should be abandoned. In fact, quite the opposite is true and the recent additional protocols to the ECHR have marked a move in this direction, echoing the importance assigned by the Charter to certain social rights by incorporating them into a core of rights which states wishing to accede to the Charter have to accept.

110. The ILO has also granted extra protection to the rights set out in certain conventions by stating in its Declaration on Fundamental Principles and Rights at Work (1998) that *"all Members, even if they have not ratified the Conventions"* in which they are enshrined, *"have an obligation arising from the very fact of membership in the Organisation to respect, to promote and to realise"* these principles.

111. The argument that the rights established in the Charter cannot be included in an Additional Protocol to the ECHR as they are not sufficiently specific to be legally enforceable is not valid because the wording of the rights enshrined in the ECHR is not very specific either. In truth, for both instruments, it is the case-law of the supervisory bodies which has determined the scope of these rights in many cases. Furthermore, as a result of the general prohibition on discrimination established by Protocol No. 12, social rights are already subject, to a certain extent, to review by the European Court of Human Rights.

112. Although the approach that has just been mentioned seems to be the right one, there is a risk that in the short term it will not be accepted, as a possibly unjustified link is often made between increased protection of social rights and the state of countries' economies. Consequently, in view of the current economic situation in Europe, more flexible solutions will have to be found. Moreover, the Court's current workload is such that a new protocol extending its sphere of activity could threaten to bring it to a standstill.

113. In conclusion, what might be considered is an additional protocol to the Charter enabling individuals or groups of individuals to lodge complaints alleging a violation of the rights set out in the Charter. These complaints would be examined by the ECSR, just as the Committee on the Elimination of Discrimination against Women does under Article 1 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.

114. The new protocol would have to be more detailed than the Collective Complaints Protocol however, particularly with regard to admissibility criteria, proceedings relating to the merits and monitoring procedures. The current negotiations at the United Nations on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights should be followed closely as they could be a source of inspiration.

115. For the time being, the option of amending the Collective Complaints Protocol to include a right of individual petition should probably be dismissed. The Protocol plays an important role in the protection of the rights enshrined in the Charter and must not be tampered with. Furthermore, any amendment would require the agreement of all the parties to the Charter and this is very difficult to achieve, as the Turin Protocol has shown.

6. A greater social rights role for the Commissioner for Human Rights

116. In Resolution (99) 50, adopted on 7 May 1999, the Committee of Ministers took account of the decisions taken by the Heads of State and Government of the member states of the Council of Europe at their Second Summit and decided to create the post of Commissioner for Human Rights. According to Article 1, paragraph 1 of the resolution, *“the Commissioner shall be a non-judicial institution to promote education in, awareness of and respect for human rights, as embodied in the human rights instruments of the Council of Europe”*. There is no doubt that the Commissioner's tasks relate to the Charter as it is one of the Council of Europe's most important human rights instruments alongside the ECHR.

117. The Commissioner's duties, which are set out in Article 3, are very broad but they do not overlap with those performed by other Council of Europe human rights instruments and hence, where the Charter is concerned, with those assigned to the ECSR and the Governmental Committee. The Commissioner acts as a kind of judicial opinion former in the member states, attempting to promote *the effective observance and full enjoyment of human rights* through awareness-raising, advice, support, information, encouragement and co-operation, either with the national authorities, who are expected to assist him in his tasks, or with human rights institutions and ombudspersons. The Commissioner uses non-binding working methods of consultation and persuasion, whose main purpose is to promote ideas.

118. The Commissioner is entitled to send reports on any particular subject to the Committee of Ministers and the Parliamentary Assembly. He or she responds to requests made by the Committee of Ministers or the Parliamentary Assembly relating to his or her task of ensuring compliance with the human rights standards of the Council of Europe, and submits an annual report to the Committee of Ministers and the Parliamentary Assembly.

119. Although the Commissioner performs his or her duties in complete independence and impartiality, he or she is required to take account of the views of the Committee of Ministers and the Parliamentary Assembly concerning his or her activities.

120. From the reports presented by the Commissioners so far, it is clear that the social rights set out in the Charter figure far less prominently than rights covered by other human rights instruments and the ECHR in particular. This situation seems to be about to change though, as the Commissioner for Human Rights stated, during the seminar to mark the tenth anniversary of the revised European Social Charter, that all human rights are closely linked, interdependent and, in effect, indivisible and talked of his personal commitment to promoting compliance with the Charter.

7. Amending the revised Charter

121. Ever since its foundation, the Council of Europe has been creating a vast array of legal instruments intended to solve the problems faced by European societies. This has entailed an ongoing process of discussing questions of common interest and subsequently drawing up new instruments or updating existing ones. In our constantly changing world, laws cannot be geared to real circumstances unless there is this ongoing appraisal process and the European Social Charter is no exception to this rule.

122. When the 1961 Charter was revised, it was noted that Article 36, which required any amendment to be approved by all the parties, was holding back the Charter's development and so it was decided to make the amendment process more flexible.

123. Under the new article that was introduced for this purpose (Article J), the number of ratifications required for an amendment to enter into force vary according to the subject matter. For amendments to Parts I and II, that is the rights established by the Charter, three ratifications suffice, whereas for Parts III to IV (undertakings, supervision of implementation, etc.), ratification by all the parties is still required.

124. Article J gave the Governmental Committee the task of examining proposed amendments and, where appropriate, submitting the adopted text to the Committee of Ministers for approval, after consultation with the Parliamentary Assembly (paragraphs 1 and 2).

125. The Article was first applied when the European Health Committee (CDSP) submitted a proposal for a new article on the right to health care (Article 32) to be added to the revised Charter. The proposal was drawn up by a committee of experts appointed by the member states, on which the Parliamentary Assembly was also represented. The Charter Secretariat attended the meetings along with an observer from the ETUC.

126. According to the Committee of Experts' report, the new Article 32 was intended to offer significant added value compared with Article 11 (right to health protection), by going beyond the notion of public health to incorporate into the Charter several aspects of the individual right to health care. The report adds that the Committee decided, on the ECSR's advice, that it was not advisable to change the wording of Article 11, but that in order to broaden its material scope a new right should be added to the revised Charter. It was also stated that the new provisions were based on the law, policies and practices of numerous member states and that account had been taken of the concern of the countries represented that no additional financial burdens should be placed on states.

127. The final report to which we have just referred was submitted to the Governmental Committee in June 2005. At its 111th meeting, this Committee concluded, in view of the lack of consensus in the European Health Committee and the reservations of certain delegates who had supported either the drafting of a new, more modern version of Article 11 or the appointment of a new working group, that it would be counter-productive to discuss a text that had so little chance of being accepted by the parties. As a result, the Committee supported the idea of setting up a joint CDSP/Governmental Committee group, which would bring together employers' and workers' representatives, to redraft a text which would attract a broader consensus and would still be submitted to it for approval.

128. Although it failed, this first attempt at amending the substantive content of the Charter would seem to confirm that Article J of the revised Charter has made it easier, compared to the 1961 Charter, to make amendments to the articles in parts I and II and add new articles. As regards amendments to parts III to VI, it seems to us that they are encountering the same difficulties as with the Turin Protocol, i.e. difficulties that will be overcome only if there is a strong political desire to enhance the protection of social rights.

129. On a more practical level, when proposals are drawn up by the Committee of Experts to accelerate the process, it would be wise to involve representatives from the Governmental Committee in view of the role assigned to it by Article J. If we want the law to satisfy society's needs, it needs to be drafted in good time to do so.

8. Discussion

130. Looking at the protection of social rights in the Council of Europe member states as a whole, it is clear that major progress has been made since the Rome Conference in 1990. The revised Charter and the 1961 Charter now cover most of these states and the dual system for monitoring whether states are honouring the undertakings made on ratification seems well established despite certain shortcomings which do not call the system into question. This does not mean that we can rest on our laurels as a more detailed analysis, based in particular on the results of the monitoring of the Charter, shows that there are still some outstanding problems.

131. The progress that has been made is not without its risks though. The growing number of parties and the increased interest that civil society organisations are showing in the Charter is leading to a growth in the workload of the supervisory bodies, which the Secretariat must deal with. In this new context, effective rationalisation measures must be adopted to meet the challenges posed by this increased burden.

132. Everyone is aware that the social situation in Europe, though nothing like as bad as in certain other areas of the world, is still a source of concern. Wealth has increased but poverty and social exclusion remain. Furthermore, the ageing of the population, the discontent of young people with

societies incapable of meeting their aspirations, violence, people moving around from one country to another in search of employment or better living conditions, the lack of decent housing and discrimination against society's most vulnerable groups are problems which, although not new *per se*, are different in nature to what they were in the past.

133. We cannot expect the Charter to solve all these problems but it can form the basis for a coherent European social policy that fosters social cohesion and be a means of improving and harmonising national legal systems. It will not be able to perform these functions though without some genuine commitment from all those involved, that is to say the Council of Europe institutions – the Committee of Ministers, the Parliamentary Assembly and the Secretary General – the governments of the member states, the supervisory bodies and civil society.

134. It also has to be acknowledged that society is currently in a state of flux, forever having to cope with new problems and challenges. The result is that social policies – and legislation – are constantly having to be reappraised and updated, and the suitability of international and national legal instruments and the effectiveness of their control mechanisms are under permanent review. All current remedies have to be questioned and alternative approaches have to be investigated.

135. Although most international legal instruments draw a distinction between political and civil rights and economic and social rights, this is artificial. In point of fact, there is genuine interdependence between these two categories of rights, with the enjoyment of one being dependent on the enjoyment of the other. The European Court of Human Rights has long maintained that there is *no watertight division separating the sphere of social and economic rights from the field covered by the Convention*. Therefore, while the time has not yet come to incorporate the Charter into the ECHR, the indivisibility of human rights means that we have a duty to work to bring these two key Council of Europe conventions closer together.

9. Recommendations

In the light of the foregoing, the Assembly recommends that the Committee of Ministers:

- i. take the necessary measures to ensure that states that have not already done so ratify the revised European Social Charter, the Protocol Amending the European Social Charter and the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints;
- ii. invite the parties to extend the scope of their undertakings so that the revised Charter can become a reference standard for European social policy and thus help to develop the legislation of the Council of Europe's member states;
- iii. ensure, once the Protocol Amending the European Social Charter is ratified, that the members of the European Committee of Social Rights are elected by the Parliamentary Assembly;
- iv. take account of requests for reimbursement of expenses presented by organisations that have lodged collective complaints;
- v. establish a working group to consider the possibility of an additional protocol to the Charter providing for a system of individual complaints;
- vi. take the necessary measures to respond to the ever-increasing workload caused by the growing number of states party and collective complaints;
- vii. ask the Committee of Experts:
 - a. to modify its working methods to enable the parties represented there to play a fuller part in the monitoring of undertakings;

- b. to make proposals to the Committee of Ministers, based on the results of the regular supervision process, for examinations of articles of the Charter that need to be updated;
- c. to establish new types of relationship to secure the interaction necessary for the effective application of the Charter;
- viii. ask the Commissioner for Human Rights to pay particular attention to respect for social rights, as provided for in the revised Social Charter.

The Assembly also recommends that the parties to the revised Social Charter:

- i. make further efforts to comply with the provisions they have accepted;
- ii. the parties to the Protocol should grant national NGOs the right to present collective complaints and involve other NGOs more closely in the regular supervision process.

The Parliamentary Assembly also wishes:

- i. to organise regular debates on social policy to support efforts to increase the Social Charter's influence on social policy in a greater Europe;
- ii. its role to be revised; it should become a political body for stimulation and discussion in the field of the monitoring of social rights.

Reporting committee : Social, Health and Family Affairs Committee

Reference to committee: Order 539 (1998)

Draft recommendation adopted by the Committee on 22 March 2007

Members of the Committee: Mrs Lajla Pernaska (Chair), **Mrs Christine McCafferty** (1st Vice-chair), Mr Cezar Florin Preda (2nd Vice-chair), **Mr Michael Hancock** (3rd Vice-chair), Mr Farkhad Akhmedov, Mr Vicenç Alay Ferrer, **Mr Jorodd Asphjell**, Mr Miguel Barceló Pérez, Mr Andris Berzinš, **Mr Jaime Blanco Garcia**, Mrs Raisa Bohatryova, Mrs Monika Brüning, Mrs Sanja Čeković, **Mr Igor Chernyshenko**, Mr Dessislav Chukolov, Mrs Minodora Cliveti, **Mr IMre Czinege**, Mrs Helen D'Amato (alternate: **Mr Joseph Debono Grech**), Mr Dirk Dees, Mr Stepan Demirchayan, Mr Karl Donabauer, Mr Ioannis Dragassakis, Mr Claude Evin, Mrs Daniela Filipiová, **Mr Paul Flynn**, Mrs Margrét Frimannsdóttir, Mrs Doris Frommelt, Mr Renato Galeazzi (alternate: **Mr Manfred Pinzger**), Mr Jean-Marie Geveaux (alternate: **Mr Jean-Marie Bockel**), **Mr Stepan Glăvan**, **Mr Marcel Glesener**, Mr Claude Greff, **Mr Tony Gregory**, **Mr Ali Riza Gülçiçek**, Mr Jean-Marie Happart, Mrs Olha Herasym'yuk, Mrs Sinikka Hurskainen, Mr Ali Huseynov, Mr Fazail Ibrahimli, **Mr Mustafa Ilicali**, Mrs Halide Incekara, **Mr Denis Jacquat**, Mrs Krinio Kanellopoulou, **Mr Marek Kawa**, Mr András Kelemen, Baroness Knight of Collingtree, Mr Slaven Letica, **Mr Jan Filip Libicki**, Mr Ewald Lindinger, Mr Gadzhly Makhachev, **Mr Bernard Marquet**, Mr Ruzhdi Matoshi, Mr Philippe Monfils, Mr Donato Mosella, Mrs Maia Nadiradzé, **Mrs Carina Ohlsson**, Mrs Vera Oskina (alternate : **Mr Victor Kolesnikov**) Mr Algirdas Paleckis, **Mrs Marietta de Pourbaix-Lundin**, Mrs Adoración Quesada (alternate: **Mrs Blanca Fernandez-Capel**), **Mr Walter Riester**, Mr Andrea Rigoni (alternate: **Mr Giacomo Stucchi**), Mr Ricardo Rodrigues, Mrs Maria de Belém Roseira, Mr Alessandro Rossi, **Mrs Marlene Rupprecht**, Mr Fidias Sarikas, Mr Walter Schmied, Mr Gianpaolo Silvestri, Mr Hans Kristian Skibby, **Mrs Michaela Sojdrova**, **Mrs Darinka Stantcheva**, **Mrs Ewa Tomaszewka**, Mr Oleg Tulea, Mr Alexander Ulrich (alternate : **Mr Wolfgang Wodarg**), Mr Milan Urbáni, Mrs Ruth-Gaby Vermot-Mangold, Mr Aleksandar Vučić, Mr Victor Yanukovich (alternate : **Mr Ivan Popescu**), Mrs Barbara Žgajner-Tavš (alternate : **Mrs Mojca Kucler-Dolinar**).

N.B. : The names of the members who took part in the meeting are printed in **bold**

Head of the Secretariat: Mr Géza Mezei

Secretaries of the Committee: Mrs Agnès Nollinger, Mrs Christine Meunier